

**SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**DARRELL CRAIG**

**APPELLANT**

**VS.**

**CASE NO. 2009-KA-00820-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF OF THE APPELLANT**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record verifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal:

1. Darrell Craig.....Appellant
2. Honorable Forrest A. Johnson.....Circuit Court Judge  
Amite County, Mississippi
3. Attorney General's Office - Criminal Division.....Attorney for Appellee
4. Kenya R. Martin.....Attorney for Appellant  
Darrell Craig

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### STATEMENT OF THE ISSUES

- A. WHETHER THE CIRCUIT COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS UNDER THE 270 DAY RULE.
- B. WHETHER THE CIRCUIT COURT ERRED IN ADMITTING INTO EVIDENCE A DNA REPORT, THROUGH STATE'S WITNESS, WHICH WAS FIRST PRODUCED TO APPELLANT TWO (2) DAYS BEFORE TRIAL.
  - 1. WHETHER THE CIRCUIT COURT ERRED IN ALLOWING INTO EVIDENCE TESTIMONY BASED UPON THE SUBJECT DNA REPORT WHEN THE STATE'S WITNESS WAS NOT QUALIFIED TO TESTIFY AS AN EXPERT WITNESS.
- C. WHETHER THE CIRCUIT COURT ERRED IN ADMITTING INTO EVIDENCE ARTICLES OF CLOTHING AND FIREARMS, WHEN THE STATE FAILED TO ESTABLISH A PROPER CHAIN OF CUSTODY FOR THE ITEMS ONCE SEIZED BY LAW ENFORCEMENT OFFICIALS.
- D. WHETHER THE CIRCUIT COURT DENIED APPELLANT'S RIGHT TO A FAIR AND IMPARTIAL JURY BY STRIKING TWO (2) AFRICAN-AMERICAN, EMPANELED JURORS.

## STATEMENT OF THE CASE

On September 15, 2008, Appellant, Darrell Craig, (hereafter referred to as Appellant), brought on for hearing his Motion to Dismiss the charges under the indictment, wherein he was originally charged with armed robbery, based upon the violation of his Constitutional rights under the 270-day rule. (RE. 7-9).<sup>1</sup> Appellant's indictment was dated August 24, 2007. (RE. 7). Appellant was arraigned on the charged under the indictment on September 21, 2007. (RE. 7). By the trial court's own admission, the matter was tried outside of 270 days. (RE. 8-9; 12). Appellant's case was tried on September 18, 2008, well outside the 270 days as required by Mississippi law. (RE. 10-12). By the trial court's own admissions, Appellant did not attribute to any delays in prosecuting his case to trial. (RE. 12-14). As a result, Appellant's Motion to Dismiss should have been granted.

At the trial of this matter, the trial court allowed into evidence, over Appellant's objections, a written DNA report which was first produced two (2) days before trial. (TR. 263-269; 283-284). The trial court allowed into evidence testimony from Kathryn Moyse, the State's only expert witness regarding the subject report, although the testimony was speculatively at best. (TR. 263-269; 283-284). The trial court allowed Moyse to read the report into the trial record. (TR. 319-320). Appellant was effectively denied an opportunity to obtain a forensic expert witness in order to rebut the questionable testimony offered by the State's witness. (TR. 263-269; 283-284). Allowing the DNA report and the corroborating testimony amounted to trial by ambush on the part of the State, and effectively denied Appellant his right to a fair jury trial.

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<sup>1</sup> RE denotes "Record Excerpts."

Additionally, various articles of clothing and firearms—to which the State failed to establish a proper chain of custody once the items were seized by law enforcement officials, were also allowed into evidence. (TR. 183).<sup>2</sup> The law enforcement officials who initially seized these items never labeled the bags containing the items, nor did they inventory the items at the point of collection. (TR. 183). Without being able to establish a proper chain of custody for these items, the Circuit Court erred by allowing them into evidence. (TR. 183).

Lastly, the Court improperly struck two (2) empaneled, African-American jurors during the trial of this matter, which ultimately denied Appellant his Constitutional right to a fair and impartial jury. (TR. 114-120). Striking these empaneled jurors was an abuse of the trial court's discretion, as no showing was ever established (by the trial court or otherwise) that the jurors could not be fair and impartial in the fulfillment of their sworn oaths.

After approximately an hour of jury deliberations, Appellant was convicted on the charge of armed robbery. (TR. 433). Appellant timely filed his post trial motion for judgment notwithstanding the verdict, and alternatively, motion for a new trial. All of Appellant's post trial motions were denied. On May 20, 2009, Appellant filed his Notice of Appeal before this Court.

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<sup>2</sup> TR denotes "Trial Record."



### STATEMENT OF FACTS

On December 12, 2006, four (4) unidentified individuals entered the Trustmark Bank in Gloster, Mississippi. (TR. 86). At all relevant times, the faces of all four (4) individuals were covered. (TR. 86). The individuals were armed with semi-automatic weapons and other firearms. (TR. 86). The individuals demanded money and committed to rob the Trustmark Bank in Gloster. (TR. 86). The true identifies of these four (4) individuals has never been discovered by law enforcement officials.

On August 24, 2007, Appellant was indicted by an Amite County grand jury on the charge of armed robbery for his alleged participation in the subject bank robbery. (RE. 7-13). Appellant, to this day, contends he was physically present in Houston, Texas at the time of the robbery, and in no way participated in the criminal act. (TR. 368-391). At trial, Appellant also offered corroborating testimony from relatives and a friend in order to establish the fact that he was physically present in Houston, Texas at the time of the subject robbery. (TR. 336-339; 349-353).

On September 21, 2007, Appellant was arraigned, and an Order of Arraignment was filed with the Clerk of the Circuit Court for Adams County, Mississippi on September 21, 2007. (RE. 7-13). Trial was initially set for January 30, 2008. (RE. 7-13). Due to delays solely caused by the State in electing to try other criminal cases before this matter, Appellant's Constitutional right to a speedy trial was ultimately violated. On September 15, 2008, just three (3) days before the trial of this matter, Appellant brought on for hearing his Motion to Dismiss the charges under the indictment based upon the 270-day rule, as the State violated his Constitutional right to a speedy trial. (RE. 7-13). Appellant's motion was ultimately denied. (RE. 7-13). Appellant's case was tried on September 18, 2008, well outside the 270 days from his arraignment as required by Mississippi law.

(RE. 10-12). By the trial court's own admissions, Appellant did not attribute to any delays in this particular matter. (RE. 12-14). As a result, Appellant's Motion to Dismiss should have been granted.

At the trial of this matter, the Circuit Court erroneously allowed into evidence, over Appellant's objections, a written DNA report which was first produced two (2) days before trial. (TR. 263-269; 283-284). The trial court allowed into evidence testimony from Kathryn Moyse, the State's only expert witness regarding the subject report, although the testimony was speculatively at best. (TR. 263-269; 283-284). Moyse practically read the entire DNA report into evidence at trial. (TR. 319-320). The offering witness even admitted that the type of DNA testing which was performed on the inside of a boot is not a reliable method when compared to other traditional methods of DNA testing. (TR. 320-326). Appellant was effectively denied an opportunity to obtain a forensic expert witness in order to rebut the questionable testimony offered by the State's witness. (TR. 263-269; 283-284).

Additionally, various articles of clothing and firearms—to which the State failed to establish a proper chain of custody once the items were seized by law enforcement officials, were also allowed into evidence. (TR. 183). The law enforcement officials who initially seized these items never labeled the bags contained the items, nor did they inventory the items once collected. (TR. 183). Without being able to establish a proper chain of custody for the items, the Court erred by allowing them into evidence. (TR. 183).

Lastly, the Court improperly struck two (2) empaneled, African-American jurors during the trial of this matter, which ultimately denied Appellant his Constitutional right to a fair and impartial jury. (TR. 114-120). During the trial, the State brought to the Court's attention that certain members of Appellant's family were allegedly seen talking with two (2) particular jurors. During an *in*

*camera* examination of the jurors, it was revealed that Appellant's grandmother, who suffers from vision problems, sat down beside the two jurors (TR. 114-120). Both jurors indicated that nothing was said about the trial which would have compromised their ability to be fair and impartial during the trial. (TR. 114-120). As a result, the trial court acted outside of its discretion in striking these jurors, even after they admitted to the Court that they could be and remain fair and impartial throughout the duration of the trial. (TR. 114-120).

After approximately an hour of jury deliberations, Appellant was convicted on the charge of armed robbery. (TR. 433). Appellant filed his post trial motion for judgment notwithstanding the verdict, and alternatively, motion for a new trial. Appellant's post trial motions were denied. On May 20, 2009, Appellant filed his Notice of Appeal before this Court.

## SUMMARY OF THE ARGUMENT

The Circuit Court's decision to deny Appellant's Motion to Dismiss based upon the 270 Day Rule was clearly erroneous and must be reversed. Although the Circuit Court admitted that the trial was conducted outside the 270 days as permitted by law, the Circuit Court held that the delays were not attributable to the Appellant or the State. However, this finding was not totally correct. Although the Appellant was not responsible for any delays in his case proceeding to trial, the State, on the other hand was solely responsible for the delays. The Circuit Court has minimal involvement in which criminal matters are tried and the order in which they are tried. The State voluntarily chose to try other matters before this particular case in hopes of trying all potential defendants together. However, the problem with the State's approach is at least one defendant—specifically Appellant, was effectively denied his right to a speedy and fair trial. The Circuit Court must be reversed on this particular issue.

The Circuit Court also erred in admitting into evidence a DNA report which was first produced to Appellant two (2) days before the trial. The Circuit Court allowed into evidence expert testimony regarding the subject report which was speculative at best. Kathryn Moyse, the State's expert witness, failed to offer an expert opinion within a reasonable degree of medical/professional certainty, which made the testimony ripe for exclusion. The witness also testified on numerous occasions that extracting DNA from the inside of a boot was not a traditional method of DNA analysis, nor was it as relied as other tested methods of DNA analysis. The report and testimony were improperly admitted into evidence at trial. As these admissions constitute reversible error, the judgment of the Circuit Court must be reversed and the case remanded for a new trial.

The Circuit Court also improperly admitted into evidence articles of clothing and various firearms, when the State failed to offer any witness to draw a connection between the items admitted and the Appellant. Over Appellant's objection, the Circuit Court also erred in failing to exclude these items when the State failed to show a proper chain of custody for the items once seized by law enforcement officials. At trial, the State offered testimony that the officer who first seized the items simply placed them inside a brown paper bag. The bag was never labeled by that particular officer, and the items were never properly inventoried and/or logged in. Based upon the sloppy police investigation, it was impossible for the State to establish a connection between the items seized and the subject bank robbery. As a result, the trial court committed reversible error by allowing these items into evidence.

Lastly, the Circuit Court improperly excluded two (2) empaneled, African-American jurors. During the trial of this matter, the State brought to the Court's attention that certain members of Appellant's family were allegedly seen talking with two (2) particular jurors. During an *in camera* examination of the jurors, it was revealed that Appellant's grandmother, who suffers from vision problems, mistakenly sat down beside the two jurors during the lunch recess. Both jurors indicated to the trial court that nothing was said about the trial which would have compromised their ability to be fair and impartial. Over Appellant's objection, the trial court erroneously excused these jurors even after they admitted to the Court that they could be and remain fair and impartial throughout the duration of the trial. As a result, Appellant was effectively denied his right to a trial by a fair and impartial jury.

Based upon these assignments of error, the judgment of the Amite County Circuit Court must be reversed and remanded for the reasons stated herein.

## ARGUMENT OF ISSUES ON APPEAL BY APPELLANT

The appropriate standard of review when a trial court denies a defendant's motion to dismiss in a criminal case is de novo. McLendon v. State, 945 So. 2d 372, 382 (Miss. 2006). Questions regarding evidentiary issues in a criminal context are governed by an abuse of discretion standard on appeal. Kea v. State, 986 So. 2d 358, 361 (Miss. Ct. App. 2008). The trial judge has a great deal of discretion in evaluating the relevancy and admissibility of evidence. Id. (citing Jefferson v. State, 818 So.2d 1099, 1104 (Miss.2002)). "Unless the judge abuses this discretion so as to be prejudicial to the accused, the Court will not reverse" the trial judge's rulings." Id. (citing Hughes v. State, 735 So.2d 238, 270 (Miss.1999)). A trial court is also entitled deference when it strikes or excuses an empaneled juror for cause. White v. State, 969 So. 2d 72, 77 (Miss. Ct. App. 2007). The standard of review on appeal for excusing jurors is an abuse of discretion standard. Id.

A. THE CIRCUIT COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS BASED UPON THE 270 DAY RULE, WHICH ULTIMATELY RESULTED IN A DENIAL OF APPELLANT'S RIGHT TO A SPEEDY TRIAL.

The Circuit Court erred in denying Appellant's Motion to Dismiss based upon the 270 day rule, which ultimately resulted in a denial of Appellant's right to a speedy trial. The Mississippi Supreme Court has accepted the factors set forth in Barker v. Wingo, 407 U.S. 514 (1972) when analyzing whether a criminal defendant's constitutional right to a speedy trial has been violated. White v. State, 969 So. 2d 72, 77-78 (Miss. Ct. App. 2007). The Mississippi Legislature has also codified a form of this rule via statute which holds primarily that a criminal defendant must be brought to trial no later than Two Hundred and Seventy (270) days from the date of his arraignment. Miss. Code Ann. § 99-17-1 (Rev. 2000). When the accused is not brought to trial within 270 days, absent good cause, the defendant is entitled to dismissal. Dies v. State, 926 So. 2d 910, 914 (Miss.

2006).

In determining whether a criminal defendant's right to a speedy trial has been violated, the Mississippi Supreme Court has adopted the Barker factors. White v. State, 969 So. 2d 72, 77-78 (Miss. Ct. App. 2007). The Barker factors are: a) length of the delay, b) reason for the delay, c) assertion of the right to a speedy trial, and d) prejudice to the defendant. White v. State, 969 So. 2d at 78-79. Under Barker, "[t]he length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." Id. at 78. (citing Barker, 407 U.S. at 530). In Mississippi, any delay from the date of arrest, indictment, or information until trial exceeding eight (8) months is presumptively prejudicial. Id. (citing Smith v. State, 550 So. 2d 406, 408 (Miss. 1989)). Once a delay is found to be presumptively prejudicial, the analysis then turns and the burden shifts to the State to show cause for the delay. Id. (citing Stark v. State, 911 So. 2d 447, 450 (Miss. 2005)). The appellate court must determine whether the delay should be charged to the defendant or the State. Id. Since the burden is on the State to provide the defendant with a speedy trial, this factor is usually weighed against the State unless it can show either that the delay was caused by the defendant or that the delay was for good cause. Id. (citing Wiley v. State, 582 So. 2d 1008, 1012 (Miss. 1991)). Our Courts have also held that the State may not hide behind "a crowded docket alone" when attempting to establish good cause for the delay in proceeding to trial. Id. (citing Jones v. State, 756 So. 2d 852, 857 (Miss. Ct. App. 2000)). The last two Barker factors are c) assertion of the right to a speedy trial and d) prejudice to the defendant. White v. State, 969 So. 2d at 79. "Generally, proof of prejudice entails the loss of evidence, death of witnesses, or staleness of an investigation." Id. (citing Wesley v. State, 872 So. 2d 763, 768 (Miss. Ct. App. 2004)).

speedy trial. Turning now to the reason for the delay, it is extremely important to note that the burden is upon the State to provide a criminal defendant with a speedy trial. In the case *sub judice*, the State cannot demonstrate any justifiable reason for the delay in providing Appellant with a speedy trial. To the contrary, the only reason cited by the State for the delays was a crowded docket. (RE. 7-13). The record is absolutely void of any other reason for the delay in this matter. (RE. 7-13). Aside from a crowded docket, the State nor the trial court provided any other reasons for the delay in prosecuting Appellant's case to trial. (RE. 7-13). Moreover, the State cannot hide behind a crowded docket in justifying its reasoning for denying a criminal defendant's right to a fair and speedy trial. The Appellant, the trial court, and the State all agree that the Appellant did absolutely nothing to cause and/or contribute to any delays in his case proceeding to trial. (RE. 7-13). As a result, the only reason for the delay--a crowded docket--must also be weighed against the State. The third element under the Barker factors is the assertion of the Appellant's right to a speedy trial. Appellant asserted his constitutional right to a speedy trial by filing his Motion to Dismiss all of the charges under the indictment pursuant to Miss. Code Ann. § 99-17-1. Additionally, Appellant effectively asserted his right to a speedy trial by filing no motions for continuance, by not objecting to the State's request for a body search, and by voluntarily submitting DNA samples at the State's request (RE. 7-13). As a result, the assertion of Appellant's right to a speedy trial must also be weighed against the State in this analysis based upon these specific facts. Lastly, Appellant was effectively prejudiced as a result of the delay. Appellant's primary defense at trial was he was not physically present within the State of Mississippi at the time of the subject robbery of the Trustmark bank in Gloster. In support of his defense, Appellant was prepared to offer demonstrative evidence from his bail bonding agent, Mr. Woodard, who lives and works in Houston, Texas. After



discussing this matter with Mr. Woodard, it was revealed that Appellant was in Houston, Texas one (1) day before the date of the subject robbery. However, the agent only maintained his office records of visits with criminal defendants for a two (2) year period. The record of Appellant's visit with his bonding agent on Monday, December 11, 2005; just one (1) day before the subject robbery for which Appellant was convicted; was not able to be presented during the trial of this matter due to the unnecessarily long delay in getting this matter to trial. These facts were also corroborated by Appellant's testimony at trial. (TR. 376-78). As a result, the prejudice to the Appellant under Barker must also be weighed against the State in determining whether Appellant's Constitutional right to a speedy trial was violated.

Under the 270 day rule analysis, it is obviously clear from all angles that this matter was tried well outside of the 270 days as permitted by Mississippi statute. Miss. Code Ann. § 99-17-1. Appellant was arraigned on September 21, 2007; the 270 days allowable to try his case expired on June 22, 2008, at the very latest. The total number of days between Appellant's arraignment and his trial were Three Hundred and Sixty-One (361) days. The Appellant, trial court, and State all agree that no delays in this matter were attributable to Appellant, as he completely complied with the State's request to conduct body searches, obtain fingerprints, obtain DNA samples, etc. Appellant did not oppose any motions filed by the State which would effectively attribute any delays to him. All delays in this matter must be attributable to the State, as the State is responsible for scheduling and bringing to trial criminal matters. Absent a standing order by the trial court, the State also determines the order in which criminal cases are tried. Pursuant to the authorities cited herein, the State cannot hide behind a crowded docket, and throw out its arms for protection from this Court once a criminal defendant's right to a speedy trial has been violated. Under either analysis described

above, it is clear from the record that Appellant was not tried within the 270 days of arraignment as mandated by Miss. Code Ann. § 99-17-1. Also, the Barker factors as discussed above must all be weighed against the State for the reasons cited herein. As a result, the ruling of the trial court must be reversed, and judgment dismissing this action must be rendered in favor of Appellant.

**B. THE CIRCUIT COURT ERRED IN ADMITTING INTO EVIDENCE A DNA REPORT, THROUGH THE TESTIMONY OF STATE’S WITNESS KATHRYN MOYSE, WHICH WAS FIRST PRODUCED TO APPELLANT TWO (2) DAYS BEFORE TRIAL.**

The trial court erred in admitting into evidence a DNA report, through the testimony of State’s witness, which was first produced to Appellant two (2) days before trial.<sup>4</sup> Mississippi courts have cited the rule with approval that “[t]he purpose of the discovery rules is to prevent trial by unfair surprise or ambush.” Wimberly v. State, 839 So. 2d 553, 560 (¶ 29) (Miss. Ct. App. 2002); see also Woods v. State, 973 So. 2d 1022, 1029 (Miss. Ct. App. 2008); see also State v. Berryhill, 703 So. 2d 250, 256 (Miss. 1997) (holding that trial by ambush is at odds with this Court’s jurisprudence on the need...to give enough notice for a defendant to prepare a defense).

It is wholly undisputed that the State produced the subject DNA report clearly outside of the allowable discovery period. It is also wholly undisputed that the State had either possession of or access to the subject boot (from which the DNA samples were collected) since December 2006. The State waited almost two (2) years in order to produce a DNA report two (2) days before trial—when the State’s own expert witness testified that the entire analysis usually takes about a week to complete. Moreover, Appellant did not have sufficient time to secure a forensics expert witness in

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<sup>4</sup> Although the trial court allowed the DNA report to be marked for identification only, the trial court allowed the witness to practically read the entire report into the trial record (TR. 320; TR. 315-20).

order to rebut the testimony offered by the State's witness, Kathryn Moyse. The State will probably argue that the Appellant knew and/or should have known the State's intent to introduce DNA evidence at the trial of this matter at the point when Appellant first submitted samples for DNA analysis. To the contrary, how could Appellant have known such if the State never produced any such DNA report regarding its findings? Appellant was never granted access to the subject boot at any point in time prior to trial. It was completely unfair and unreasonable to expect Appellant to be prepared to sufficiently challenge the subject DNA report, in addition to the corroborating testimony, in only two (2) days prior to trial. As Appellant did not wish to further delay the trial, and as expert testimony was required on the part of the Appellant to properly analyze the report, inspect the boot, and to rebut Moyse's findings, the only way to properly resolve this issue without further prejudicing Appellant would have been to exclude the proposed evidence at trial. Over Appellant's vigorous objections to the introduction of the report and Moyse's reading the report into the record, the trial court erroneously admitted the DNA report through the testimony of Moyse.

Moreover, it is expected that the State will also argue any harm committed by the trial court in allowing into evidence the subject DNA report through Moyse was cured by Appellant's testimony at trial that the boot belonged to him. However, the admission of the DNA report through Moyse caused such irreprehensible damage and a "suspicion of guilty" on the part of Appellant, Appellant Craig was forced to give up his Fifth Amendment Constitutional Right against self-incrimination in order to explain Moyse's testimony. Absent the trial court's error in allowing into evidence the DNA report through Moyse, Appellant would not have been forced to testify at the trial of this matter. As a result, the subject report invited the jury to assume guilt on the part of Appellant Craig, and attempted to relieve the State of its required burden of proof at trial.

1. THE CIRCUIT COURT ERRED IN ALLOWING INTO EVIDENCE TESTIMONY BASED UPON THE SUBJECT DNA REPORT WHEN THE STATE'S WITNESS WAS NOT QUALIFIED TO TESTIFY AS AN EXPERT WITNESS.

The trial court erred in allowing State's expert witness, Kathryn Moyse, to testify regarding the subject DNA report, when her testimony amounted to mere speculation and guesswork. Pursuant to Rule 702 of the Mississippi Rules of Evidence, expert testimony can be admitted into evidence on the condition that the testimony is specialized in a given area and will assist the trier of fact. Rule 702 Miss. R. Evid. The testimony must also be based upon sufficient facts and data, be the product of reliable principles and methods, and the witness must apply those principles and methods to the facts of the case. Id.

Trial courts typically have discretion in determining whether an expert is qualified to testify at trial. Baldwin v. State, 757 So. 2d 227, 230 (Miss. 2000). Under the test adopted by this Court in Polk v. State, 612 So. 2d 381, 390 (Miss. 1992), trial courts should make the following determination before DNA evidence is presented before the jury: 1) whether there is a theory generally accepted in the scientific community which supports the conclusion that DNA testing can produce reliable results, 2) whether the techniques are capable of producing reliable results in DNA identification, and 3) in the case before the court, whether the testing laboratory performed generally accepted scientific techniques without error in the performance or interpretation of the tests. Id. The Court has also held that once a determination of admissibility has been made by the trial court, the court can also allow scientific, statistical evidence which shows the frequency with which the match might occur in a given population. Hull v. State, 687 So. 2d 708, 728 (Miss. 1996).

The Mississippi Supreme Court has also held that expert testimony must be excluded when the testimony invites speculation and/or guesswork. Catchings v. State, 684 So. 2d 591, 597 (Miss.

1996) (Court indicated that an expert's opinion does not necessarily have to contain catch words "reasonable degree of certainty" in order to be admissible; however, such opinions must avoid guess work, speculation, and conjecture in order to be admissible).

Over Appellant's objections, the trial court allowed into evidence testimony from Kathryn Moyse, the State's expert witness (and only expert witness) who read the subject DNA report into the trial record. Moyse, reading from the subject report, testified: "Item 4 on Page 3 of the subject report states: 'DNA analysis of the boot yielded a partial DNA profile indicative of a mixture containing DNA from more than one individual. The suspect Darrell Craig cannot be excluded as being a contributor to this mixture profile. The probability of excluding a random individual from this mixture profile is 99.99%. The suspect Derrick Tobias and Warren Williams are excluded as being contributors.'" (TR. 319) [Emphasis added.] No other suspects and/or individuals were identified as to the source of the mixture used in the subject analysis. No measurable amount was identified which would clearly demonstrate how much of the mixture was extracted from the boot, or what percentage of the mixture was allegedly attributable to Appellant Craig. No methodology was provided as to how the report concluded that Appellant "Craig could not be excluded" as a suspect in this matter. As a result, Moyse's testimony regarding the subject report invited the jury to assume guilt on the part of Appellant Craig, and attempted to relieve the State of its required burden of proof—to establish guilt beyond a reasonable doubt. Moyse also testified that extracting DNA from the inside of a boot was not a reliable method of DNA analysis when compared to other traditional methods. (TR. 321). She also testified that her testimony would have to be weighted assuming whether or not the contributors of the DNA mixture wore socks. (TR. 322). This specific factor was never analyzed or addressed by Moyse.

Q: And I told you ninety-percent of the time that I wear socks. But isn't it a little difficult to obtain D.N.A. from the inside of a boot when ninety percent of the time somebody is wearing a sock?

A: It's hard to say. I would say that in my experience it's probably been more difficult to get profiles from inside of footwear, but it has been done.

Moyse simply avoided the question as it is impossible to obtain DNA analysis from the inside of footwear when 90% of the time the person wearing the boots have on socks. This key factor was totally unanswered. Also, Moyse could not conclusively testify from her analysis that Appellant's DNA was a match of the DNA mixture found inside the subject boot. (TR. 326).

Q: But just to clarify: You used the word "match." Your report doesn't say the word "match;" does it? It says, he cannot be excluded?

A: He cannot be excluded.

Q: It doesn't say "match?"

A: No, he cannot be excluded.

It is clear from the testimony that the State used Moyse to get into evidence testimony which was speculative and amounted to mere guesswork. The simple argument that because Moyse could not conclusively testify that Appellant was a 100% match to the mixture found inside the boot, proves that her analysis was wholly unreliable. On redirect, the following exchange was noted:

Q: How can a D.N.A. profile be found in a boot that he didn't wear?

A: There's other possibilities that would include his blood somehow getting in there or he had spit in there or a semen stain may be in there. But in order for us to get a D.N.A. profile from that boot from which he could not be excluded, his D.N.A.

would had to have been deposited on that boot in some manner. I can't tell what manner that is. But his D.N.A. cannot be excluded from the mixture on that boot, which means his D.N.A. was deposited in some way on that item.

(TR. 327) [Emphasis added.] After a close review of the record, it is clear that Moyse's testimony is littered with "possibilities" and speculation regarding her analysis of the subject boot. By her very own words, "[t]here's other possibilities that would include..." body secretions of Appellant in order to explain why he cannot be excluded from the DNA mixture. The problem with her analysis and testimony is that she never identified what secretions were analyzed; moreover, she never testified that those secretions conclusively belonged to Appellant. Appellant preserved his objection to exclude any and all testimony regarding the subject DNA report and corroborating testimony in his Motion in Limine. Appellant renewed his objection as stated within his Motion in Limine when Moyse was called to the witness stand. (TR. 320). As a result, the subject report and corresponding testimony invited the jury to assume guilt on the part of Appellant Craig, and attempted to relieve the State of its required burden of proof at trial. The trial court committed reversible error in this regard.

C. THE CIRCUIT COURT ERRED IN ADMITTING INTO EVIDENCE ARTICLES OF CLOTHING AND FIREARMS, WHEN THE STATE FAILED TO ESTABLISH A PROPER CHAIN OF CUSTODY FOR THE ITEMS ONCE SEIZED BY LAW ENFORCEMENT OFFICIALS.

The circuit court erred in admitting into evidence articles of clothing and firearms, when the State failed to establish a proper chain of custody for the items once seized by law enforcement officials. Trial court decisions in matters regarding the chain of custody of evidence will not be disturbed absent a finding of abuse. Anderson v. State, 904 So. 2d 973, 979 (¶ 19) (Miss. 2004). The "test for the continuous possession [i.e., 'chain of custody'] of evidence is whether or not there

is any indication or reasonable inference of probable tampering with the evidence or substitution of the evidence.” Id. (quoting Gibson v. State, 503 So. 2d 230, 234 (Miss. 1987)).

It is wholly undisputed that the State failed to establish and authenticate the original chain of custody regarding the articles of clothing admitted into evidence, as no law enforcement officer or official who testified at the trial could properly testify that at the time the articles of clothing were collected, he/she bagged the items and properly labeled the bags. The State called two (2) witnesses—Lester Lambert and Danny Mauex—regarding the seizure of various articles of clothing and firearms which were scattered across Amite County following the subject robbery. Lambert testified that once he arrived on Highway 33 North, he noticed various articles of clothing. (TR. 159). He also testified that he, alongwith Officer Mauex, started to pick up and bag these items. (TR. 159; TR. 183). Neither Lambert nor Mauex labeled the bags in order to clearly indicate which items were placed in which bags. Neither Lambert nor Mauex testified that they saw Appellant wearing any of the items seized following the subject robbery. Neither Lambert nor Mauex testified that they saw Appellant throwing anything out of any vehicle following the robbery. Most importantly, neither Lambert nor Mauex could testify that the items they saw at trial were in fact the items they bagged following the robbery. Without properly labeling the items once seized, the State could not properly establish a correct chain of custody for the items seized. Appellant properly preserved his objection for the record at trial. (TR. 183).

Moreover, the seizing officer, Danny Mauex, could not testify as to where the bags were taken once sealed.

Q: Okay. And I think you testified earlier—when you gathered those items, you didn’t label the bags, did you?



A: No, sir.

Q: You didn't?

A: No, sir.

Q: So you really don't know and you can't testify as to whether the bags were reopened or not, can you?

A: No, sir.

Q: You can't testify as to whether items in these bags were taken out or new items were put in, can you?

A: No, sir.

Q: Officer Mauex, tell the jury: Ultimately, where did these items go to? Better question: Did they go to the Mississippi State Crime Lab after—

A: I have no idea, sir.

(TR. 194). The State never offered one (1) witness who conclusively testified that the items presented at trial, were in fact, the same items seized by law enforcement officials on the day of the subject robbery. As a result, the trial court abused its discretion in allowing into evidence these particular items as the State failed to establish a proper chain of custody.

D. THE CIRCUIT COURT ERRED IN STRIKING TWO (2) EMPANELED, AFRICAN-AMERICAN JURORS AT THE TRIAL OF THIS MATTER, WHICH DENIED APPELLANT HIS RIGHT TO A FAIR AND IMPARTIAL JURY TRIAL.

The trial court erred in striking two (2) empaneled, African-American jurors at the trial of this matter, which effectively denied Appellant his right to a fair and impartial jury trial. A trial court is entitled deference when it strikes or excuses an empaneled juror for cause. White v. State, 969 So. 2d 72, 77 (Miss. Ct. App. 2007). The standard of review on appeal for excusing jurors is

an abuse of discretion standard. Id.

During the trial, the State brought to the Court's attention that certain members of Appellant's family were allegedly seen talking with two (2) particular jurors. During an *in camera* examination of the jurors, it was revealed that Appellant's grandmother, who suffers from vision problems, sat down beside the two jurors. Both jurors indicated that nothing was said about the trial which would have compromised their ability to be fair and impartial during the trial. Despite their candor with the Court, the jurors were struck from the panel and replaced with two (2) alternates. As a result, the trial court acted outside of its discretion in striking these jurors, even after they admitted to the Court that they could be and remain fair and impartial throughout the duration of the trial. As a result, the circuit court erred in striking these two (2) jurors as the court failed to establish a bias or partiality on the parts of these jurors which would warrant excusing them. By the trial court's own admission, the Town of Liberty is small, and there are not a ton of places to eat during the lunch hour. On at least one (1) day during the trial and during the lunch hour, Appellant's counsel had lunch inside of a small restaurant there in Liberty, while two or three jurors ate in the same establishment. Nothing was said and no words were exchanged; however, these statements speak to the point that the town is small, and it is not uncommon to bump into people—even jurors on a criminal trial. The circumstances that gave way to these jurors being excused was innocent, not very long, unintentional, and certainly in no way prejudicial to the State at trial. Moreover, the trial court supported this position when it indicated: "I'm not saying that anything was improper—I believe these two jurors..." (TR. 118). Aside from these facts, the trial court improperly excused these jurors without any finding whatsoever that they could not be and remain fair and impartial throughout the duration of the trial. As a result, the trial court abused its discretion.

## CONCLUSION

The circuit court's ruling on Appellant's motion to dismiss based upon the 270 day rule must be reversed and judgment rendered in favor of Appellant dismissing the original charges under the indictment based upon the reasons and authorities cited herein. Aside from a crowded docket, the record is absolutely void of any other reason as to why Appellant's case was not tried within the time frame permitted by law. The circuit court also abused its discretion in allowing into evidence the subject DNA report through Kathryn Moyse. After a careful and thorough review of Moyse's testimony, it is surprisingly clear that she was not qualified to render expert opinion testimony in this matter. As Appellant did not wish to further delay the trial, and as expert testimony was required on the part of the Appellant to properly analyze the report, inspect the boot, and to rebut Moyse's findings, the only way to properly resolve this issue without further prejudicing Appellant would have been to exclude the proposed DNA evidence at trial. The trial court erred in this specific regard which ultimately allowed the jury to infer guilty on the part of Appellant, as opposed to the State being forced to prove its case beyond a reasonable doubt. The trial court also erred in allowing into evidence articles of clothing and firearms without any proper chain of custody being established by the State. Additionally, there was no chain of custody ever established for the subject boot in this matter. Lastly, the trial court also abused its discretion by striking two (2) empaneled, African-American jurors at the trial of this matter. As a result of these cumulative errors, the Appellant is entitled to a reversal of the judgment entered in this matter by the Amite County Circuit Court.

CERTIFICATE OF SERVICE

I, Kenya R. Martin, attorney for Appellant, DARRELL CRAIG, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing Brief For Appellant to Honorable Forrest A. Johnson, Circuit Court Judge, Sixth Judicial District, Post Office Box 1372, Natchez, Mississippi 39121; Attorney General's Office - Criminal Division, Post Office Box 220, Jackson, Mississippi 39205-0220; Honorable Ronnie Harper, Amite County District Attorney's Office, Post Office Box 1148, Natchez, Mississippi 39121; and Darrell Craig, MDOC #142708 32-E, Parchman, Mississippi 38738.

Dated this the 24<sup>th</sup> day of September, 2009.

  
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**SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**DARRELL CRAIG**

**APPELLANT**

**VS.**

**CASE NO. 2009-KA-00820-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**


**CERTIFICATE OF MAILING**

I, Kenya R. Martin, attorney for Appellant, DARRELL CRAIG, do hereby certify that I have this day mailed, by United States mail, proper postage prepaid, the following documents:

1. Original of the Brief of Appellant, Darrell Craig;
2. Three (3) copies of the Brief of Appellant, Darrell Craig;
3. Four (4) copies of the Record Excerpts for Appellant, Darrell Craig

to: Betty W. Sephton  
Supreme Court Clerk  
Post Office Box 249  
Jackson, Mississippi 39205-0249

Respectfully submitted on this the 24<sup>TH</sup> day of September, 2009.

  
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